

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service	)	CC Docket No. 96-45
	)	
Leaco Rural Telephone Cooperative, Inc.	)	
	)	
Petition for Commission Agreement	)	
To Redefine the Service Areas of Rural	)	
Telephone Companies in New Mexico	)	

**PETITION FOR REDEFINITION**

Leaco Rural Telephone Cooperative, Inc. (“Leaco”), by its attorneys, pursuant to Section 214(e)(5) of the Communications Act of 1934, *as amended*, (“Act”) and Federal Communications Commission (“FCC” or “Commission”) Rule 54.207, hereby submits this Petition for FCC Agreement to Redefine the Service Areas of Rural Telephone Companies in New Mexico (“Petition”). Leaco requests the Commission’s concurrence with the New Mexico Public Regulation Commission’s (“NMPRC”) redefinition of Leaco’s service area as well as certain wire centers associated with rural incumbent local exchange carriers (“ILEC”) Dell Telephone Cooperative, Inc. (“Dell”), Tularosa Basin Telephone Company Inc. (“Tularosa”), ENMR Telephone Cooperative, Inc. (“ENMR”), Penasco Valley Telephone Cooperative (“Penasco”), and Windstream Communications Southwest (“Windstream”).<sup>1</sup>

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<sup>1</sup> See *In the Matter of the Application of Leaco Rural Telephone Cooperative, Inc., as a CMRS Provider for Designation as Eligible Telecommunications Carrier for Additional Service Areas*, Utility Case No. 07-00235-UT, Recommended Decision of the Hearing Examiner (November 8, 2008) (“*Recommended Decision*”). See also *In the Matter of the Application of Leaco Rural Telephone Cooperative, Inc., as a CMRS Provider for Designation as Eligible Telecommunications Carrier for Additional Service Areas*, Utility Case No. 07-00235-UT, Final Order, (November 13, 2008) (“*Final Order*”). The *Recommended Decision* and *Final Order* are

## I. INTRODUCTION

Leaco is a multi-divisional telecommunications cooperative providing service in southeastern New Mexico as an ILEC and, through its unincorporated divisions, as a competitive local exchange carrier (“CLEC”), as a commercial mobile radio service (“CMRS”) provider, and as an Internet Service Provider (“ISP”). In 2002 and 2006, the NMPRC granted Leaco approval, respectively, to be designated as an eligible telecommunications carrier (“ETC”) in order to receive Federal universal service support pursuant to § 254 of the Telecommunications Act of 1996<sup>2</sup> for the provision of wireline services in the territories it serves as a CLEC and for the provision of wireless services it provides as a CLEC.

On June 7, 2007, Leaco filed an application for designation as a competitive ETC (“CETC”) as a wireless carrier. On August 24, 2007, Leaco petitioned the NMPRC for further CETC designation for Leaco’s entire rural ILEC study area for the provision of its CLEC wireless operation. Specifically, Leaco requested ETC designation to serve the entirety of its ILEC study area and certain entire wire centers of rural ILECs Dell, Tularosa, ENMR, Pensaco, and Windstream, each of which either straddles Leaco’s FCC-licensed area boundary or is wholly contained within Leaco’s FCC-licensed area. Accordingly, Leaco requested that the NMPRC redefine study areas of the affected ILECs. Leaco sought NMPRC approval for study

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collectively referred to as the “*Order*.” The *Order* is attached hereto as Exhibit A. On November 25, 2008, the NMPRC certified with the FCC that Leaco had received approval for expanded CETC designation, as provided in the *Order*. This certification is attached hereto as Exhibit B.

<sup>2</sup> See *In the Matter of the Application of Leaco Rural Telephone Cooperative, Inc., as a CMRS Provider for Designation as Eligible Telecommunications Carrier for Additional Service Areas*, Utility Case No. 07-00235-UT, Petition for Designation as an Eligible Telecommunications Carrier in Additional Areas of New Mexico (August 24, 2007). On December 17, 2007, Leaco filed a Petition (Updated) for Designation as an Eligible Telecommunications Carrier in Additional Areas of New Mexico.

area redefinitions to accommodate the fact that Leaco currently is not licensed to provide wireless service

The Act dictates that an ETC will be designated in a service area determined by the appropriate state commission.<sup>3</sup> The term “service area” means a geographic area established by a state commission.<sup>4</sup> In the case of an area served by a rural telephone company,<sup>5</sup> service area means “study area” unless and until the FCC and the state commission, after taking into consideration recommendations of the Federal-State Joint Board (“Joint Board”), establish a different definition of service area for such company.<sup>6</sup>

The Act requires that the state commission take into consideration the Joint Board’s recommendations when redefining a rural telephone company’s study area.<sup>7</sup> In its *Recommended Decision*, the Joint Board outlined its concerns for redefining a rural telephone company’s service area.<sup>8</sup> These concerns include: (1) minimizing rural “cream skimming;” (2) recognizing that the Act places rural telephone companies on a different competitive footing from other carriers; and (3) recognizing the administrative burden of requiring rural telephone companies to calculate costs at something other than a study area level.<sup>9</sup>

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<sup>3</sup> 47 U.S.C. § 214(e)(2).

<sup>4</sup> 47 U.S.C. § 214(e)(5).

<sup>5</sup> 47 U.S.C. § 153(37) (definition of a rural telephone company).

<sup>6</sup> 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207(b).

<sup>7</sup> 47 U.S.C. § 214(e)(5).

<sup>8</sup> *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, ¶¶ 172- 174 (1996) (“*Joint Board Decision*”); see also *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-338 ¶ 38 (January 22, 2004) (“*Virginia Cellular Order*”).

<sup>9</sup> See generally *Recommended Decision*; see also *RCC Holdings, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, 17 FCC Rcd 23532 (2002) (“*RCC Holdings*”).

After receiving testimony and conducting a hearing on the merits of Leaco's *ETC Petition*, the NMPRC adopted its *Order* granting the *ETC Petition* on November 13, 2008.<sup>10</sup> Specifically, the NMPRC found that Leaco satisfied the eligibility criteria for designation as a federal CETC in the aforementioned rural service area and wire centers and that such designation was in the public interest, and it approved Leaco's designation in said areas. The NMPRC also held that nothing in its *Order* shall be construed in any manner to affect the study areas of the affected ILECs for any other purpose (such as requiring disaggregation or altering the mechanism for calculating service costs). Pursuant to the FCC's Rules, a state commission or other party seeking FCC agreement in redefining a service area served by a rural telephone company shall submit a petition to the FCC.<sup>11</sup> Accordingly, Leaco submits this Petition for FCC agreement with the NMPRC's redefinition of certain New Mexico service areas. Pursuant to FCC Rule Section 54.207(c)(1), this petition includes: (1) the definition proposed by the state commission, and (2) the state commission's ruling or other official statement presenting the state commission's reasons for adopting its definition including an analysis that takes into consideration the Joint Board's recommendations.<sup>12</sup>

## **II. DISCUSSION**

Leaco requests the Commission's concurrence with the NMPRC's *Order*. The NMPRC's *Order* expands Leaco's ETC designation in the entirety of its ILEC study area and in the wire centers of rural ILECs of Dell, ENMR, Penasco, Tularosa and Windstream. Pursuant to FCC Rule 54.207(c), Leaco notes that the NMPRC's analysis included consideration of the Joint Board's study area redefinition recommendations. Among other factors, the NMPRC

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<sup>10</sup> *See Order*.

<sup>11</sup> 47 C.F.R. § 54.207.

<sup>12</sup> 47 C.F.R. § 54.207(c).

considered: (1) whether Leaco is attempting to “cream skim” by only proposing to serve the lowest cost exchanges; (2) the rural carriers’ special status under the Act; and (3) the administrative burden these ILECs would face by calculating their costs on a basis other than their entire study areas. The NMPRC’s analysis is discussed below.

#### **A. Leaco is Not Attempting to Cream Skim**

Rural “cream skimming” occurs when competitors serve only the low-cost, highest revenue customers in a rural telephone company’s study area.<sup>13</sup> Leaco based its requested ETC area on its licensed service area and requested redefinition at the wire center level in accordance with the FCC precedent, particularly *Highland Cellular*.<sup>14</sup> Pursuant to *Highland Cellular*, the FCC analyzed several factors to determine whether the CETC is attempting to cream skim, including the service area in which the ETC applicant requests designation, whether the incumbents have taken advantage of disaggregation, and population density.

The NMPRC’s analysis considered as its basis FCC permissive guidelines for cream skimming analysis for CETCs proposing to compete with rural ILECs:

49. When a competitive carrier requests ETC designation for an entire rural service area, it does not create creamskimming concerns because the affected ETC is required to serve all wire centers in the designated service area. The potential for cream skimming, however, arises when an ETC seeks designation in a disproportionate share of the higher-density wire centers in an incumbent LEC’s service area. By serving a disproportionate share of the high-density portion of the service area, and ETC may receive more support than is reflective of the rural incumbent LEC’s costs of serving that wire center because support for each line is based on the rural telephone company’s average costs for serving the entire service area unless the incumbent LEC has disaggregated its support. Because line density is a significant cost driver, it is reasonable to assume that the highest-density wire centers are the least costly to serve, on a per-subscriber basis ....

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<sup>13</sup> See *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6422, 6438, ¶ 26 (“*Highland Cellular*”) (2004).

<sup>14</sup> See generally *Highland Cellular*.

51. The Commission has also determined that creamskimming concerns may be lessened when a rural incumbent LEC has disaggregated support to the higher-cost portions of the incumbent's service area. Specifically, under the Commission's rules, rural incumbent LECs are permitted to depart from service area averaging and instead disaggregate and target per-line high-cost support into geographic areas below the service area level. By doing so, per-line support varies to reflect the cost of service in a particular geographic area, such as a wire center, within the service area.<sup>15</sup>

In testimony before the NMPRC, Leaco provided a cream skimming analysis with respect to all of the wire centers that are either within or outside of Leaco's proposed amended ETC area. Specifically, Leaco argued that the ILEC areas to be included in the ETC designation have relatively low population densities rather than high population densities, which would indicate potential cream skimming. With respect to disaggregation issue discussed above, the NMPRC recognized that one affected rural ILEC Windstream had a disaggregation plan in both of its study areas. Following its analysis and its consideration of Leaco's testimony, the NMPRC concluded that Leaco had demonstrated that it is not picking and choosing the lowest-cost exchanges.

#### **B. The NMPRC Considered Rural Carriers' Special Status Under the Act**

In addition to cream skimming, the Joint Board recommended that the FCC and the States consider that the 1996 Act places rural carriers on a different competitive footing than other LECs.<sup>16</sup> Determination of public interest is one of the considerations the Joint Board recommended. Leaco presented evidence to NMPRC as to why it is in the public interest to approve its request. In its *Order*, the NMPRC conducted a comprehensive public interest analysis that referenced both State rules and FCC precedent. In its public interest analysis, the

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<sup>15</sup> *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, 20 FCC Rcd 6371, 6392-6394, ¶¶ 49, 51 (rel. March 17, 2005) (*citations omitted*).

<sup>16</sup> *Joint Board Decision at* ¶ 173.

NMPRC considered New Mexico's State Rural Universal Service Fund rule<sup>17</sup> and other numerous factors such as (1) the benefits of increased competitive choice; (2) the impact of multiple designations on the [federal] universal service fund; (3) the unique advantages and disadvantages of the competitor's service offering; (4) any commitments made regarding quality of telephone service provided by competing providers; and (5) the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame.<sup>18</sup>

*Highland Cellular* discusses the disaggregation issue:

Third, we find that redefining United Telephone's service area as proposed will not require United Telephone to determine its costs on any basis other than the study area level. Rather, the redefinition merely enables competitive ETCs to serve areas that are smaller than the entire ILEC study area. Our decision to redefine the service area does not modify the existing rules applicable to rural telephone companies for calculating costs on a study area basis, nor, as a practical matter, the manner in which United Telephone will comply with these rules. Therefore, we find that the concern of the Joint Board that redefining rural service areas might impose additional administrative burdens on affected rural telephone companies is not at issue here.<sup>19</sup>

Leaco argued that it is highly unlikely that granting its *ETC Petition* would affect or prejudice any future action that the NMPRC or the FCC may take with respect to any ILEC's status as a rural telephone company. Leaco also argued that its requested service area redefinition would not diminish an ILEC's status as such. Furthermore, the affected ILECs in this case, acting as interveners, requested that the Recommended Decision include an affirmative determination that the redefinitions proposed by Leaco would not require the affected rural ILECs to disaggregate

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<sup>17</sup> See N.M. Admin. Code. 17.11.10.24.A.

<sup>18</sup> See *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563 (rel. Jan. 22, 2004).

<sup>19</sup> *Highland Cellular* at ¶ 41.

their wire centers or otherwise alter the current mechanism for calculating their cost of service on a study area basis. In its *Order*, the NMPRC adopted such an affirmative determination.

**C. Redefining the Rural ILEC Service Areas Will Not Be Administratively Burdensome on the Affected ILECs**

Pursuant to the Joint Board's recommendation, the NMPRC considered the administrative burden the rural ILECs would face following redefinition and Leaco's designation. In discussing this factor in the *Highland Cellular*,<sup>20</sup> the FCC found that the redefinition of the ILEC service area would not require the ILEC to determine its costs on any basis other than the study area level. The FCC did not find that redefinition would impose an administrative burden on the ILEC.<sup>21</sup> Similarly, Leaco argued that Leaco's request to redefine its CETC service area to less than the affected rural ILECs' entire study areas along wire center boundaries is made solely for ETC designation purposes.

As in *Highland Cellular*, Leaco asserted that redefining the service area for ETC purposes would not administratively burden the way that affected rural ILECs calculate their costs, but solely would enable Leaco to begin receiving high-cost support in those areas in the same manner as the ILECs. The affected rural ILECs could continue to calculate costs and submit data for purposes of collecting high-cost support in the same manner as before. Leaco asserted that it was not asking any ILEC to disaggregate its study area. The NMPRC found that in this case, as in *Highland Cellular*, redefinition would not impose any administrative burden on the ILEC.

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<sup>20</sup> *See Id.*

<sup>21</sup> *See Id.*

### **III. CONCLUSION**

For the foregoing reasons, Leaco respectfully requests the Commission's concurrence with the NMPRC's redefinition of Leaco's, Dell's, ENMR's, Penasco's, Tularosa's and Windstream's rural service areas in accordance with Leaco's further CETC designation.

Respectfully submitted,

**LEACO RURAL TELEPHONE  
COOPERATIVE, INC.**

*/s/ Kenneth C. Johnson*

By: \_\_\_\_\_

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Its Attorneys

Dated: March 4, 2009

**Leaco Rural Telephone Cooperative, Inc.**

**EXHIBIT A**

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>IN THE MATTER OF THE PETITION OF</b>	)	
<b>LEACO RURAL TELEPHONE COOPERATIVE,</b>	)	
<b>INC., AS A CMRS PROVIDER FOR DESIGNATION</b>	)	<b>Case No. 07-00235-UT</b>
<b>AS AN ELIGIBLE TELECOMMUNICATIONS</b>	)	
<b>CARRIER FOR ADDITIONAL SERVICE AREAS</b>	)	
<hr style="width: 60%; margin-left: 0;"/>		

**FINAL ORDER**

**THIS MATTER** comes before the New Mexico Public Regulation Commission (“Commission”) upon the Recommended Decision of the Hearing Examiner (“Recommended Decision”) issued by Elizabeth C. Hurst on October 8, 2008. Having considered the Recommended Decision (which is attached hereto as Exhibit 1 and incorporated herein by reference), and the record in this case, and being fully informed in the premises,

**THE COMMISSION FINDS AND CONCLUDES:**

1. Staff and the parties have waived exceptions to the Recommended Decision, and the Recommended Decision (“RD”) is otherwise uncontested.
2. On October 19, 2008, Leaco Rural Telephone Cooperative, Inc. (“Leaco”) filed a Motion for an Errata Notice to correct certain information relating to Leaco’s Hondo and Capitan wire centers.
3. The RD includes Appendix 1, consisting of a table listing the wire centers for which the RD would grant Leaco expanded ETC designation. Appendix 1 indicates by an asterisk those wire centers which straddle Leaco’s FCC-licensed area.
4. According to Leaco’s Motion, apparently as a result of an oversight by Leaco, the wire centers of Hondo and of Capitan were marked with an asterisk in the list

set out in Appendix 1, thereby incorrectly creating the impression that the wire centers of Hondo and Capitan straddle Leaco's FCC-licensed area. The Motion for Errata Notice requests correction of this error. The other parties in the case all concur in Leaco's motion.

5. Leaco's Motion for Errata Notice should be granted.

6. The Commission has jurisdiction over the parties and the subject matter of this case.

7. The Commission accepts and adopts the Hearing Examiner's Statement of the Case through the time of the issuance of the Recommended Decision.

8. The Commission accepts and adopts the Hearing Examiner's Discussion as the Discussion of the Commission.

9. The Commission accepts and adopts the Hearing Examiner's Findings and Conclusions as the Findings and Conclusions of the Commission.

10. The Recommended Decision, as modified pursuant to this Order's granting of Leaco's Motion for Errata Notice, is well taken and should be adopted by the Commission.

**IT IS THEREFORE ORDERED:**

A. Leaco's Motion for Errata Notice is hereby GRANTED; *provided*, that the corrections requested in that Motion shall be made to pursuant to this Order, without the separate issuance of an Errata Notice.

B. The Orders recommended by the Hearing Examiner, as set forth in Exhibit 1 attached hereto and as modified pursuant to this Order, are ADOPTED, APPROVED, and ACCEPTED as Orders of the Commission.

C. The Recommended Decision is ADOPTED, APPROVED and ACCEPTED, as modified pursuant to this Order.

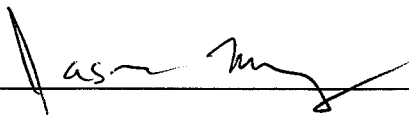
D. This Order is effective immediately.

E. Copies of this Order shall be sent to all persons listed on the attached Certificate of Service.

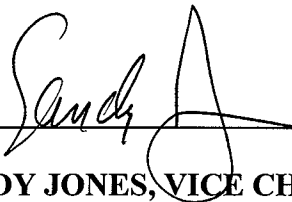
F. This Docket is closed.

ISSUED under the seal of the Commission at Santa Fe, New Mexico, this 13<sup>th</sup>  
day of November, 2008.

NEW MEXICO PUBLIC REGULATION COMMISSION



JASON MARKS, CHAIRMAN



SANDY JONES, VICE CHAIRMAN

EXCUSED

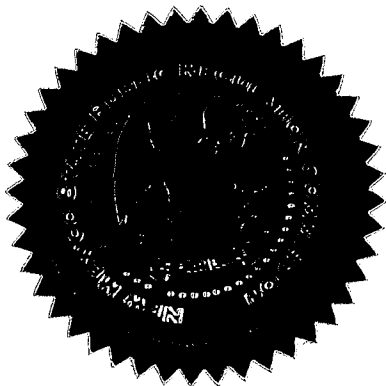
DAVID W. KING, COMMISSIONER

APPROVED

BEN R. LUJAN, COMMISSIONER

EXCUSED

CAROL K. SLOAN, COMMISSIONER



**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE PETITION OF )  
LEACO RURAL TELEPHONE COOPERATIVE, )  
INC., AS A CMRS PROVIDER FOR DESIGNATION ) UTILITY CASE NO. 07-00235-UT  
AS AN ELIGIBLE TELECOMMUNICATIONS )  
CARRIER FOR ADDITIONAL SERVICE AREAS )

**RECOMMENDED DECISION OF THE HEARING EXAMINER**

Elizabeth C. Hurst, Hearing Examiner for this case, submits this Recommended Decision to the New Mexico Public Regulation Commission ("Commission" or NMPRC") pursuant to 17.1.2.32.E(4) and 17.1.2.39.B NMAC. The Hearing Examiner recommends that the Commission adopt the following discussion, findings of fact, conclusions of law and decretal paragraphs in its final order.

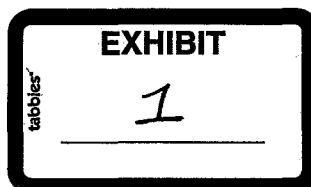
**STATEMENT OF THE CASE**

On June 7, 2007, an Application for designation as a competitive eligible telecommunications carrier, hereinafter referred to as ("CETC or ETC") was filed on behalf of Leaco Rural Telephone Cooperative Inc.'s unincorporated division, competitive local exchange carrier, in this case operating as a wireless carrier, hereinafter referred to as ("Leaco").

On June 20, 2007, the Commission issued an Order designating Elizabeth Hurst as the Hearing Examiner.

On June 26, 2007, the Hearing Examiner issued an Order Setting Pre-Hearing Conference.

A Pre-Hearing Conference was held on July 9, 2007, to discuss the procedural matters and the details for this case.



On July 9, 2007, an Order Setting Second Pre-hearing Conference was entered.

On July 27, 2007, Leaco filed a Motion to Vacate and Reschedule the Pre-Hearing Conference requesting that the Hearing Examiner reschedule the Second Pre-Hearing conference scheduled on July 31, 2007 to August 10, 2007.

On July 30, 2007, the Hearing Examiner issued an Order Granting Motion to Vacate and Reschedule Pre-Hearing Conference.

On July 31, 2007, Leaco filed a Certificate of Service and Notice of Mailing of Motion to Vacate and Reschedule Pre-Hearing Conference.

On August 10, 2007, a Pre-Hearing Conference was held.

On August 24, 2007, Leaco filed a Motion for Waiver of Requirements Pertaining to Petitions that seek a Support Rate, a Motion for Protective Order, and a Petition for Designation as an Eligible Telecommunications Carrier in Additional Areas of New Mexico on behalf of Leaco.

On August 27, 2007, Leaco filed Leaco's Exhibit's "A-1 and A-2".

On August 29, 2007, Leaco filed a Statement of Supplemental Authorities in Support of Leaco's Motion for Protective Order.

On August 29, 2007, the Hearing Examiner issued a Procedural Order that set forth the procedural schedule that included the following dates: (1) Leaco was required to cause the notice to be published one time in the Albuquerque Journal and one time in newspapers in Artesia, Alamogordo, Carlsbad and Ruidoso no later than September 7, 2007; (2) Leaco's direct testimony was required to be filed by September 7, 2007; (3) an intervention date was set for September 28, 2007; (4) Intervenors could file direct testimony by October 15, 2007; (5) Staff was required to file direct testimony by October

24, 2007; (6) any rebuttal testimony was required to be filed by November 16, 2007; (7) any stipulations and testimony supporting the stipulation to be filed by November 29, 2007; and (8) a public hearing was set to begin on December 13, 2007.

On September 6, 2007, Staff of the Commission's Utility Division ("Staff") filed Staff's Response, Reply and Amendment to Protective Order.

On September 7, 2007, Leaco filed the Direct Testimony of Laura M. Phipps.

On September 10, 2007, the Hearing Examiner entered a Protective Order.

On September 10, 2007, Leaco filed a Correction of Certificate of Service filed on September 7, 2007, and Exhibits "A" and "B" to Direct Testimony of Laura Phipps.

On September 18, 2007, Windstream Communications Southwest ("Windstream") filed a Motion to Intervene.

On September 24, 2007, Nondisclosure Agreements for Nickie Vigil-Garcia and Bill Garcia were filed.

On September 26, 2007, Motions for Leave to Intervene were filed on behalf of Dell Telephone Cooperative, Inc. ("Dell"), Tularosa Basin Telephone Company Inc. ("Tularosa"), ENMR Telephone Cooperative, Inc. ("ENMR"), and Penasco Valley Telephone Cooperative, Inc. ("Penasco").

On September 27, 2007, Nondisclosures Agreements for Avelino Gutierrez and Ken Smith were filed.

On October 2, 2007, a Nondisclosure Agreement for William P. Templeman was filed.

On October 2, 2007, a Notice of Filing of Confidential documents was filed on behalf of Leaco.

On October 11, 2007, Leaco filed a Notice of filing of Original Affidavits of Publication evidencing publication of the Notice of Hearing in the *Alamogordo Daily News* on September 2, 2007, *Albuquerque Journal* on September 2, 2007, *Artesia Daily Press* on September 2, 2007, *Carlsbad Current-Argus* on September 2, 2007, and *Ruidoso News* on August 31, 2007.

On October 24, 2007, Staff filed a Motion to Extend time for Filing Staff and Rebuttal Testimony until October 31, 2007, and rebuttal testimony until November 22, 2007.

On October 30, 2007, the Hearing Examiner issued a Second Procedural Order granting Staff's request for extension to file any direct testimony on or before October 31, 2007, and requiring any rebuttal to be filed on or before November 22, 2007.

On October 31, 2007, the testimony of Ken Smith was filed on behalf of Staff.

On November 11, 2007, a Nondisclosure Agreement for Steven Asher was filed.

On November 27, 2007, Leaco filed a Motion for Extension of Rebuttal Deadline and for vacating the December 13, 2007, Hearing.

On November 28, 2007, Staff filed a Nondisclosure Agreement for Michael S. Ripperger.

On November 30, 2007, the Hearing Examiner issued a Third Procedural Order vacating the Hearing set for December 13, 2007, and ordering that a public hearing be held on February 11, 2007. The Third Procedural Order established a deadline for Leaco testimony to be filed by December 17, 2007, and Staff and Intervenors testimony by January 25, 2008.

On December 17, 2007, Leaco filed a Notice of Filing of Additional Confidential

Documents, Petition (Updated) for Designation as an Eligible Telecommunications Carrier in Additional Areas of NM, and the Rebuttal Testimony of Laura M. Phipps on behalf of Leaco.

On December 27, 2007, a Nondisclosure Agreement for Luana Waller was filed.

On January 10, 2008, a Nondisclosure Agreement for Rob S. Strait was filed.

On January 25, 2008, Staff filed a Motion for Order Granting Extension of time to File Testimony in Response to Leaco's Testimony.

On January 29, 2008, Staff filed Supplemental Testimony of Ken D. Smith.

On February 6, 2008, Staff filed a Nondisclosure Agreement for Joan Ellis.

On February 11, 2008, Leaco filed a Nondisclosure Agreement for Joseph Estrada and Wanda Munson.

On February 11, 2008, the Hearing on the Merits was held. The following counsel entered appearances at the hearing: Steve Asher for Leaco; William P. Templeman for Dell, Tularosa, ENMR, and Penasco, Bill Garcia for Windstream; and Avelino Gutierrez for Staff.

During the course of the hearing the following witnesses presented testimony and were subject to cross-examination: Laura M. Phipps on behalf of Leaco; and Ken D. Smith on behalf of Staff.

The Intervenors did not offer testimony or affidavits. No persons appeared to provide public comment in this case. At the hearing, Staff requested, and Leaco agreed to furnish additional information post hearing prior to Staff making a recommendation on Leaco's Application.

On March 3, 2008, the Transcript of the Hearing ("Tr.") was filed.

On March 4, 2008, the Hearing Examiner issued the Order Concerning Legal Briefs that required legal briefs to be filed on or before March 28, 2008.

On March 24, 2008, Leaco and Staff filed the Joint Motion for an Extension of Time for Filing Briefs requesting that the deadline for the filing post-hearing legal briefs be extended from March 28, 2008, to April 11, 2008. Leaco and Staff asserted that an extension of time would give Staff a sufficient amount of time to review the supplemental materials on Leaco's LITAP efforts and on Leaco's 5 year plan that Staff requested near the end of the hearing, and which Leaco expected to be provide to Staff by March 25, 2008.

On March 24, 2008, the Hearing Examiner issued an Order Granting Extension of Time for the Filing of Legal Briefs that allowed post-hearing documents to be filed on or before April 11, 2008.

On March 31, 2008, Steve Asher filed a Notice of Unavailability.

On April 10, 2008, the Hearing Examiner issued an Order Granting Second Extension of Time for Legal Briefing and Setting Additional Procedural Dates that required Leaco to file a legal pleading that required Leaco to address its failure to comply with the requirement to serve the Notice of Hearing upon the telecommunication's service list, and any impacts on notice, due process considerations, and/or any remedies. The Order also required Staff to file a responsive pleading to Leaco's required pleading, and allowed intervenors to respond if they so chose.

On April 14, 2008, Leaco filed Leaco's Brief on Failure of Counsel to Serve Every Person or Entity on the Telecom Service List with a Copy of the Notice of Hearing and

Affidavit of Leaco's Counsel.

On April 14, 2008, Leaco filed its Motion to Introduce Supplemental Documents.

On April 16, 2008, Counsel for Intervenors, William P. Templeman filed Statement Regarding the Adequacy of Notice.

On April 18, 2008, Staff filed Staff's Response to Leaco's Brief on the Failure of Counsel to Serve the Telecommunications Service List.

On April 18, 2008, Staff filed Staff's Response to Leaco's Motion to Introduce Supplemental Documents.

On April 29, 2008, the Hearing Examiner issued an Order Finding Adequate Notice and Granting Motion to File Supplemental Information. Due to the remedial measures undertaken by Leaco's counsel, Leaco's failure to serve the Telecommunications Service List did not, in this case, cause a failure of notice. Taken as a whole, the notice provided in this case was adequate to comport with due process requirements.

On May 6, 2008, Leaco filed Supplemental Confidential and Non-confidential documents.

On May 12, 2008, Staff filed an Affidavit stating under oath that Staff had reviewed the documents filed by Leaco on May 6, 2008, and now recommended approval of Leaco's Application in this docket.

On May 28, 2008, William Templeman, attorney for several intervenors, filed his post-hearing brief.

On May 29, 2008, Leaco filed its Confidential Errata Notice for Supplemental Documents as well as its Notice of Filing Confidential Errata Notice.

On May 29, 2008, Leaco filed the Joint Proposed Recommended Decision of Leaco and Staff.

On July 17, 2008, Counsel for Leaco sent an e-mail to all parties and the Hearing Examiner regarding the filing of a substitute "clean copy" of Appendix 2.

On August 11, 2008, the Hearing Examiner e-mailed all parties and advised Leaco to file a motion to substitute the exhibit.

On August 13, 2008, Leaco filed its Unopposed Motion to Substitute Appendix "2".

Leaco's Unopposed Motion to substitute Appendix 2 is **GRANTED**.

## **DISCUSSION**

### **I. Leaco and its Request**

Leaco is a multi-divisional telecommunications cooperative providing service in southeastern New Mexico as an incumbent local exchange carrier ("ILEC") and, through its unincorporated divisions, as a competitive local exchange carrier ("CLEC"), as a commercial mobile radio service ("CMRS") provider, and as an ISP (Internet Service Provider). Petition, 8/24/07. Leaco provides service in portions of Chaves, Eddy and Lea counties and as a CLEC, in portions of the service territories of Windstream and Qwest Corporation (Qwest).

Leaco is a telecommunications carrier as defined in 47 U.S.C. §153(44)<sup>1</sup>, and is presently authorized by the FCC to provide cellular mobile

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<sup>1</sup> 47 U.S.C. § 153(44). Section 153(43) defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." In turn, a "telecommunications carrier" is defined as "any provider of telecommunications services." 47 U.S.C. § 153(44). Finally, section 153(46) defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public." 47 U.S.C. § 153(46).

telecommunications and Personal Communications Service ("PCS") in eastern New Mexico. Leaco is a licensed PCS provider in the Hobbs (call sign WPOJ776), Roswell (call sign KNLH693), and Carlsbad (call sign WPOJ775) Basic Trading Areas ("BTA"). Leaco is authorized to provide cellular service in New Mexico RSA No. 6 – Lincoln under call sign KNKQ337. Leaco Updated Petition, p. 4; Tr., pp. 101.

In Utility Case No. 3347, Leaco received approval from the Commission for its requested designation as an ETC, pursuant to section 214(e)(1) of the federal Communications Act,<sup>2</sup> for the provisioning of wireline services in the territories it serves as a CLEC. Final Order, 3/26/02. Leaco had previously received CLEC designation for all of the GTE of the SouthWest (now Windstream #1) exchanges of Carlsbad, Carlsbad Caverns, Loving, Lovington, Hobbs Main, Hobbs North, Eunice and Jal, and non-rural designation for US West's (now Qwest) exchanges of Artesia, Roswell Main, Roswell South and Portales.

In Case No. 06-00396-UT, the Commission granted Leaco approval to be designated as a state and federal ETC on a prospective basis only for the wireless services it provides as a CLEC in the exchanges in the Valor (now Windstream) study area and Qwest service territory for which Leaco CLEC was previously granted ETC designation for wireline services. *Final Order* 3/14/06. The Commission designated Leaco as an ETC for the wireless ETC service area of the Lovington, Hobbs, East Hobbs, Eunice, Jal, Loving, Carlsbad, Carlsbad Caverns wire centers served by Windstream #1, and the Roswell, Cottonwood and Artesia wire centers served by Qwest. Phipps Direct, p. 7.

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<sup>2</sup> 47 U.S.C. § 214(e)(1). See 47 C.F.R. § 54.101(a). The Communications Act of 1934, as amended by the Telecommunications Act of 1996 – Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* – is referred to hereafter as the "Communications Act."

The instant case involves a request by Leaco for further CETC designation. This expansion includes the entire study area of Leaco Rural ILEC for Leaco's CLEC wireless operation. Staff Exhibit 2 (Smith Supplemental), p. 2. Leaco is currently FCC-licensed (wireless licensed area) to provide service in: (a) the entirety of the study area of Leaco's ILEC; (b) in portions of Dell, E.N.M.R, Tularosa which (wire centers) straddle Leaco's FCC-licensed area boundary; and (c) the portions of the study area of one ILEC, Penasco, consisting of several (entire) wire centers that are completely within Leaco's FCC wireless licensed areas.

In its Updated Petition, filed on December 17, 2007, Leaco requested designation as an ETC in the entirety of Leaco's ILEC study area and in certain (entire) wire centers of the following Rural ILECs: Dell; E.N.M.R; Penasco; Tularosa, and Windstream. Leaco is not seeking designation in the remainder of the study areas of those ILECs. In its Petition, Leaco now seeks to extend its wireless ETC service area to additional territory which it is authorized to serve via its FCC licenses described above. Leaco also is seeking to extend its ETC designated area to include a few wire centers that straddle Leaco's FCC-licensed area boundary. Accordingly, Leaco requested redefinition of the study areas of the few affected ILECs. For that reason, Leaco provided (Second Revised) Exhibit "C," a cream skimming analysis as evidence that Leaco is not attempting to "cherry pick" the densely populated areas served by the ILECs.

The additional requested ETC area consists of the entirety of Leaco's ILEC study area and of certain entire wire centers of the following Rural ILECs: Dell, ENMR, Penasco, Tularosa, and Valor Telecommunications of NM, LLC #2 (dba Windstream #

2).<sup>3</sup> Phipps Rebuttal, p. 5. Revised Exhibit "A" filed with the Rebuttal Testimony is a map showing the area which Leaco requests to be added to its CETC designation (the areas within the red boundary) as well as Leaco's existing ETC areas. A chart showing the name of the locality and of each of the specific individual wire centers of each Rural ILEC with respect to which Leaco proposes to extend its CETC service area is attached to the Rebuttal Testimony as (Second Revised) Exhibit "B."<sup>4</sup> As indicated above, each of the few small areas outside of Leaco's FCC boundary in which Leaco proposes it be designated as a CETC are part of a wire center which straddles Leaco's FCC service boundary and therefore also includes territory within that FCC boundary. By seeking designation as a CETC for both the portions of straddling wire center that are without and within Leaco's FCC boundary, Leaco seeks CETC designation for the entirety of each of those wire centers.

Those straddling wire centers (for the entirety of which Leaco seeks CETC designation) referred to in (b) above of this paragraph are Dell's wire center; Queen's wire center, ENMR's Corona wire center and Tularosa's Carrizozo wire center. Paragraph (c) includes the following wire centers; Cottonwood, Hondo, Hope, Loco Hills and Lakewood but excludes Mayhill. See Phipps Rebuttal Test., p. 4, Leaco's Second Revised Exhibit "B." Because each of the above straddling and non-straddling wire centers is only a portion of the specified ILEC's study area, Leaco is requesting

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<sup>3</sup> At this time, Leaco asserted in its Updated Petition that it does not request ETC designation in any additional non-rural ILEC areas beyond those for which Leaco already has been designated as an ETC. Updated Petition, p. 5. Additionally, Leaco is not applying at this time for USF support from the New Mexico state USF fund. *Id.*, p. 2.

<sup>4</sup> Revised Exhibit "B" and Revised Exhibit A correspond to Appendix "1" (a table) and Appendix "2" (a map) attached to the Recommended Decision. The map identifies the area that Leaco requests to be added to its CETC designation (the areas within the red) and the chart identifies the specific wire centers that Leaco seeks CETC designation.

redefinition of the study areas of those ILECs. Tr. (Phipps) p. 54. Staff does not object to the revised study area definitions proposed by Leaco. Smith Supplemental Test., p. 15.

Section 214(e)(2) of the Federal Telecom Act provides that ETC designations shall be made for a "service area" designated by the state commission. In areas served by a rural telephone company, "service area" means the incumbent local exchange carrier ("ILEC") study area unless and until the FCC and the pertinent state, taking into account recommendations of the Federal-State Joint Board on Universal Service ("Joint Board"), establish a different definition of ETC service area for such company, a process known as service area redefinition.<sup>5</sup> Where Leaco's proposed ETC service area covers an entire rural ILEC study area, or an ILEC service area previously redefined along wire-center boundaries, the Commission may designate Leaco as an ETC without the need to redefine the ILEC service areas.

According to Leaco's Updated Petition, Leaco's proposed amended ETC service area includes the entire study area of its own ILEC affiliate and specified wire center listed on (Second Revised) Exhibit "B" of specified rural ILECs. Updated Petition, pp. 5-6. In a few cases, Leaco is not licensed to serve 100% of its proposed ETC service area. In order to meet its obligation under Section 214(e) of the Federal Telecom Act to serve throughout its proposed ETC service area, Leaco asserted it will: (a) serve areas within its FCC licensed areas by use of its own facilities and (possibly, in some cases) by the resale of other carriers' services; and (2) serve areas outside of its FCC licensed areas by the resale of other carrier's services in combination with our own facilities. *Id.*,

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<sup>5</sup> See 47 C.F.R. § 54.207(b).

p. 6. Leaco also claimed it would enter into such resale agreements to provide these services in its proposed extended areas as needed, upon ETC designation. *Id.*

There was no testimony presented by the Intervenors. However, Intervenors Dell, Tularosa, ENMR, and Penasco have asserted that Leaco is seeking Commission approval for ETC designation in geographic areas comprising part, but not all, of the study areas of the Intervenors. Leaco is seeking Commission approval for study area redefinitions to accommodate the fact that Leaco currently is not licensed to provide wireless service throughout the Intervenors' study areas. Staff and Intervenors argued that the proposed redefinitions of Intervenor's study areas would not, if approved, require disaggregation by Intervenors of the wire centers in their areas or otherwise require modification of existing rules applicable to rural telephone companies for calculating their costs of service on a study area basis. Smith Supplemental, pp.17-20; Tr. pp. 54-55; Intervenors' Post-Hearing Brief.

Leaco has not requested that disaggregation be ordered in connection with the proposed redefinitions of the study areas. Tr., p. 55. Intervenors argued that this would be consistent with the FCC's analysis in *Highland Cellular*.<sup>6</sup> Intervenors' Post-Hearing Brief. These Intervenors have requested that if the Commission grants Leaco's Application, that an affirmative determination be included that the redefinitions do not require the Intervenor's to disaggregate their wire centers or otherwise alter the current mechanism for calculating their costs of service on a study area basis. Intervenors' Post-hearing Brief.

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<sup>6</sup> FCC 04-37, *Highland Cellular ETC Designation Order*, 19 FCC Rec, Memorandum Opinion and Order, adopted February 24, 2004, released April 12, 2004 ("*Highland Cellular*").

## **II. Federal and State Statutory and Regulatory Requirements**

The Commission designates ETCs for support from both the state Rural Universal Service Fund and the federal Universal Service Fund. The standards the Commission applies are a combination of New Mexico standards and those prescribed by the Communications Act. The Commission has previously designated at least one common carrier as an ETC in most, if not all, of the service areas related to this case. Leaco's Petition therefore falls under the provisions of section 214(e)(2) dealing with requests for ETC designation in areas already served by one or more ETCs. In such cases, section 214(e)(2) prescribes that, "[u]pon request and consistent with the public interest, convenience and necessity," a state commission may designate more than one common carrier as an ETC in "an area served by a rural telephone company" and shall designate an additional carrier as an ETC in "all other [*i.e.*, non-rural] areas," provided that "each additional requesting carrier meets the requirements of [section 214(e)(1)]."<sup>7</sup> Section 214(e)(2) provides, moreover, that state commissions must consider the "public interest, convenience and necessity" when designating more than a single ETC for a particular service area.

The Communications Act provides that a common carrier designated as an ETC shall be eligible to receive universal service support from the federal high cost fund (HCF) throughout the service area for which the designation is received. 47 U.S.C. § 214(e)(1). Universal service support may be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.<sup>8</sup> To receive USF support, a common carrier must (i) offer the services supported by

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<sup>7</sup> 47 U.S.C. § 214(e)(2).

<sup>8</sup> 47 U.S.C. § 254(e); 47 C.F.R. § 54.7. See 17.11.10.27.A NMAC ("Fund support must be used to preserve and advance universal service support").

federal universal service support mechanisms<sup>9</sup>, either using its own facilities or a combination of its own facilities and resale of another carrier's services, and (ii) advertise the availability of such services. 47 U.S.C. § 214(e)(1)(A) & (B). In addition, eligible carriers must offer discounts to low-income consumers through the Lifeline and Link Up programs. 47 C.F.R. §§ 54.405, 54.411.<sup>10</sup>

ETC designation does not in and of itself impart an entitlement to support from the federal fund. Rather, ETC designation makes a carrier eligible to receive funding to support subscribers of its universal service offerings that comply with the FCC's rules and regulations.

Further, once designated, "a carrier's continuing status as an [ETC] is contingent upon continued compliance with the requirements of section 214(e) and only an eligible carrier that succeeds in attracting and/or maintaining a customer base to whom it provides universal service will receive universal service support."<sup>11</sup> A carrier's continuing status as an ETC also requires compliance with SRUSF annual verification,<sup>12</sup> reporting<sup>13</sup> and the federal certification<sup>14</sup> requirements.

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<sup>9</sup> The FCC has identified nine core services as those to be supported by the federal universal service support mechanism and provided by ETCs pursuant to 47 U.S.C. § 214(e)(2): (1) voice grade access to the public switched network; (2) access to local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to inter-exchange services; (8) access to directory assistance services; and (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101.

<sup>10</sup> There are three components to the federal USF's Low Income Program. Lifeline support reduces eligible customers' monthly charges for basic telephone service. Link Up support reduces the cost of initiating new telephone service. The third component, Toll Limitation Service, or TLS, allows eligible customers to subscribe to toll blocking or toll control at no cost. See [www.universalservice.org/li/about/default.aspx](http://www.universalservice.org/li/about/default.aspx). The Universal Service Administrative Company (USAC) administers the USF, including among other things the HCF and the Low Income Program.

<sup>11</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8853-8854, ¶ 138 (rel. May 9, 1997) ("*First Report and Order*"), *aff'd in part and rev'd on other grounds*, *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. granted*, *GTE Serv. Corp. v. FCC*, 530 U.S. 1213, *cert. dismissed*, 531 U.S. 975 (2000).

<sup>12</sup> 17.11.10.24.F NMAC.

<sup>13</sup> 17.11.27 NMAC (Reporting Requirements for Eligible Telecommunications Carriers; New Mexico Register, Vol. XIX, No. 3, Feb. 14, 2008). See *In the Matter of the Certification of Eligible*

### **III. ETC Designation Section 214(e) Requirements**

Section 214(e)(1) of the Act requires that in order to be eligible to receive universal service support an ETC applicant must: (i) be a common carrier; (ii) offer all of the services set forth in 47 C.F.R. § 54.101 (a) supported by federal universal service support mechanisms, either using its own facilities or a combination of its own facilities and resale of another carrier's services, (iii) advertise the availability of those supported services. 47 U.S.C. § 214(e)(1)(A)-(B); (iv) make the services available throughout the designated service area; (v) provide Lifeline/Link Up services and offer discounts to low-income consumers through the Lifeline and Link Up programs. 47 C.F.R. §§ 54.405, 54.411; and (vi) demonstrate that such ETC designation is consistent with the public interest.

#### **A. Leaco Satisfies the Requirements for Status as a Common Carrier**

A common carrier is defined in 47 U.S.C. § 153(10) as a person engaged as a common carrier on a for-hire basis in interstate communications utilizing either wire or radio technology. Section 332(a)(1) of the Act provides that a commercial mobile radio service ("CMRS") provider is treated as a common carrier except as otherwise determined by the FCC, and 47 C.F.R. § 20.9(a)(7) and (11), respectively, specifically provide that cellular service and PCS, such as that provided by Leaco, is considered a common carrier service. Leaco affirmed that it is a common carrier. Updated Petition, p. 13. Staff's witness testified that Leaco is a common carrier. Tr. (Smith) p. 194; and Smith Direct Test., p. 46. No evidence or testimony was introduced to the contrary. Leaco meets the requirement of being a common carrier.

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*Telecommunications Carriers to the Federal Communications Commission*, NMPRC Case No. 05-00359-UT, Final Order (Oct. 25, 2007) (adopting 17.11.27 NMAC). Rule 27.C provides that compliance with the reporting requirements of the rule satisfies the ETC's annual verification requirements under Subsection F of 17.11.10.24 NMAC.

<sup>14</sup> 47 C.F.R. §§ 54.313 & 54.314.

## **B. FCC Required Supported Services**

The supported services which an ETC applicant is required to provide are:

- 1) voice grade access to the public switched network;
- 2) local usage;
- 3) dual tone multi-frequency signaling or its functional equivalent;
- 4) single-party service or its functional equivalent;
- 5) access to emergency services;
- 6) access to operator services;
- 7) access to interexchange service;
- 8) access to directory assistance; and
- 9) toll limitation for qualifying low-income consumers.

47 C.F.R. § 54.101(a).

Both Leaco witness Laura Phipps and Staff witness Ken Smith testified that Leaco ETC designation will provide all of the supported service requirements for a universal service offering in its proposed area that the universal service offering was adequate. Tr. (Phipps) p. 88; Tr. (Smith) p. 194.

The first required supported service, voice-grade access to the public switched telephone network, is the ability to make and receive phone calls, within a bandwidth of approximately 2700 Hertz, within the 300 to 3000 Hertz frequency range. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration. Leaco meets this requirement by providing voice grade access to the public switched network through interconnection arrangements with local telephone companies. Leaco offers its subscribers this service at bandwidth between 300 and 3,000 hertz as required by 47 C.F.R. 54.101(a)(1), thereby providing voice grade access. Phipps Direct Test., p. 11, Updated Leaco Petition, p. 10.

The second supported service an ETC must offer is local usage. Leaco meets this requirement. Phipps Direct Test., p. 11, Updated Leaco Petition, pp. 10-11.

The third required supported service is dual-tone, multi-frequency ("DTMF") signaling, or its functional equivalent. DTMF is a method of signaling that facilitates the transportation of call set-up and call detail information. Additionally, consistent with the principles of competitive and technological neutrality, the FCC permits carriers to provide signaling that is functionally equivalent to DTMF in satisfaction of this service requirement. 47 C.F.R. § 54.101(a)(3). Leaco satisfies this requirement by providing DTMF signaling to facilitate the transportation of signaling throughout its network. Leaco currently uses out-of-band digital signaling and in-band multi-frequency ("MF") signaling that is functionally equivalent to DTMF signaling. Phipps Direct Test., p. 11, Updated Leaco Petition, p. 11.

The fourth required supported service, "Single-party service," means that only one party will be served by a subscriber loop or access line in contrast to a multi-party line. *First Report and Order*, 12 FCC Rcd at 8 810. The FCC has concluded that a wireless provider offers the equivalent of single-party service when it offers a dedicated message path for the length of a user's particular transmission. *Id.* Leaco provides "single-party service," as that term is defined in Section 54.101 of the FCC's rules. See 47 C.F.R. § 54.101. Phipps Direct Test., p. 11, Updated Leaco Petition, p. 11.

The fifth supported service ETCs must offer is "access to emergency services." 47 C.F.R. § 54.101(a). Any universal service offering is required to

provide the ability to reach a public emergency service provider by dialing 911. Access to emergency services includes access to 911 or enhanced 911 ("E-911"). Leaco currently provides 911 access to emergency services throughout its service area. Leaco also currently provides and will continue to provide E-911 access according to the FCC's rules applicable to CMRS carriers. Phipps Direct Test., p. 11, Updated Leaco Petition, p. 12.

The sixth required supported service is access to operator services. This service is defined as any automatic or live assistance provided to a customer to arrange for the billing or completion, or both of a telephone call. First Report and Order, 12 FCC Rcd at 8817, 175. Leaco meets this requirement by providing all of its customers with access to operator services through either Leaco itself or other carriers (e.g., incumbent LECs or interexchange carriers ("IXCs")). Phipps Direct Test., p. 10, Updated Leaco Petition, p. 12.

The seventh supported service common carriers must offer, or intend to offer, in order to be designated as an ETC is access to interexchange service to make and receive toll or interexchange calls. Equal access is not required inasmuch as "[t]he FCC do[es] not include equal access to interexchange service among the services supported by universal service mechanisms." *First Report and Order*, 12 FCC Rcd at 8819, ¶ 78. Leaco meets this requirement by providing all of its customers with the ability to make and receive interexchange or toll calls through an agreement Leaco has with an IXC. Phipps Direct Test., p. 10, Updated Leaco Petition, p. 12.

17.11.10.24A(9) NMAC requires that a carrier seeking ETC designation

must acknowledge that it may be required to provide equal access if all other ETCs in the designated area relinquish their designations. In compliance with 17.11.10.24A.(9) NMAC, Leaco has committed that if all other ETCs in a designated area relinquish their ETC designation, Leaco will provide equal access to customers in its designated service area. Phipps Direct Test., p. 11, Updated Leaco Petition, p. 21.

The eighth required supported service is the ability to place a call to directory assistance. However, white pages directories and listings are not required service offerings. *First Report and Order*, 12 FCC Rcd at 8821. Leaco satisfies this requirement. Phipps Direct Test., p. 11, Updated Leaco Petition, p. 12.

Finally, the ninth required supported service is toll limitation for qualifying low-income customers. An ETC must offer either "toll control" or "toll blocking" services to qualifying Lifeline customers at no charge. The FCC no longer requires an ETC to provide both services as part of the toll limitation service required under 47 C.F.R. §54.101(a)(9). *Fourth Order on Reconsideration*, 12 FCC Rcd 2372, IT 114-116. In particular, all ETCs must provide toll blocking, which allows customers to block the completion of outgoing toll calls. *First Report and Order*, 12 FCC Rcd at 8821-8822, ¶ 82. Leaco satisfies this requirement. Phipps Direct Test., p. 11, Updated Leaco Leaco Petition, p. 12.

Leaco and Staff expressly concurred that Leaco provides the nine supported services, indicating its understanding "Leaco currently provides all of these [supported] services and that it commits in its application to making these

services available throughout its signal coverage areas." Tr. (Smith) p. 194; Updated Leaco Petition, p. 29. Therefore, Leaco has presented substantial evidence establishing its capability and commitment to providing the required services upon designation.

### C. Advertising

Pursuant to Section 214(e)(1) of the Act, an ETC applicant must advertise the availability of the services supported by the universal service mechanisms, throughout its proposed ETC service area. Based upon the recommendations of the Joint Board on Universal Service, the Federal Communications Commission ("FCC") has not adopted particular standards regarding advertising using media of general distribution. *First Report and Order*, 12 FCC Rcd at 8860, ¶ 148. However, in *Virginia Cellular*<sup>15</sup>, the FCC concluded that Virginia Cellular satisfied the advertising requirement by "certif[ying] that it 'will use media of general distribution that it currently employs to advertise its universal service offerings throughout the service areas designated by the Commission. 19 FCC Rcd at 1574, ¶ 25. Additionally, *Virginia Cellular* detailed methods for advertising its Lifeline and Linkup programs. *Id.* Echoing its prior decisions, the FCC concluded, "because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service offering in its designated service area." *Id.*

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<sup>15</sup> *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563 (rel. Jan. 22, 2004) ("*Virginia Cellular*").

The specific ETC "service area" proposed by Leaco in this case is discussed below. Leaco has provided evidence that it will offer and advertise the services supported by the federal universal service mechanisms (and the corresponding charges) throughout its proposed ETC service area in a manner that fully informs the general public within its designated service areas. Tr. (Phipps) p. 88. Leaco will provide the required advertising by utilizing the same media of general distribution that it currently employs, such as newspapers, radio, billboard advertising and posters. Tr. (Phipps), pp. 64-65; Tr. (Phipps) pp. 82-83. The areas covered by such advertising will include the narrow areas outside Leaco's FCC boundaries. Tr. (Phipps) pp. 26-27, 82-86; Phipps Rebuttal Test., p. 8.

In an FCC's 2005 Order<sup>16</sup> addressing the ETC designation process, the FCC summarizes the requirements of advertising Lifeline and Link Up:

"State commissions and the Commission are charged with reviewing ETC designation applications for compliance with section 214(e) (1) of the Act. A common carrier designated as an ETC must offer the services supported by the federal universal service mechanisms throughout the designated service area. The ETC must offer such services using either its own facilities or a combination of its own facilities and resale of another carrier's services. The ETC must also advertise the supported services and the associated charges throughout the service area for which designation is received, using media of general distribution. In addition, an ETC must advertise the availability of Lifeline and Link Up services in a manner reasonably designed to reach those likely to qualify for those services".

Leaco has provided sufficient evidence to comply with this requirement.

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<sup>16</sup> FCC 05-46 Report and Order CC Docket 96-45 released March 17, 2005, ¶ 17, page 9.

**D. Provide Lifeline/Link Up services and offer discounts to low-income consumers through the Lifeline and Link**

In its current New Mexico ETC service area, Leaco has implemented federal Lifeline and Link-Up programs, and the state LITAP program, that offer discounted service to those lowest-income customers who have not previously had the opportunity to afford any choice in telephone service. Updated Petition, p. 14. Leaco's LITAP policy also is spelled out in the supplemental documents (Exhibits "M" and "N") that it filed after the conclusion of the hearing on the merits of this case. Leaco's specific efforts to reach low-income consumers as outlined in its testimony and its exhibits also will be addressed as part of Leaco's annual compliance filing.

Leaco has demonstrated its compliance with his requirement.

**E. Services availability throughout the designated service area and redefinition of study areas**

Designation of ETCs in service areas served by rural carriers must be for the rural ILEC's whole "study-area" unless the state commission approves and the FCC concurs with a different geographic service area (47 U.S.C. § 214(e)(5)). A "study area" is commonly known as the existing service area of an ILEC and generally includes all of the exchanges in which the ILEC provides service (generally wireline) within the state. The original study area boundaries were fixed as of November 15, 1984. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8872, 91 172 n.434 (rel. May 9, 1997) (*First Report and Order*).

Pursuant to Section 214(e) of the Act, a state commission generally has authority

to designate carriers that satisfy the requirements of the federal universal service rules as ETCs and to define their service areas, 47 U.S.C. § 214 (e). The Act explicitly sets forth a process whereby a competitive ETC may be designated for a service area that differs from the ILEC's study area. Specifically, Section 214(e) of the Act provides:

... "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company.

Rural ILEC were largely in place as the regulations developed. The initial wireless geographic licenses were issued by the FCC with the political subdivision of county as their basic building block. The FCC established a procedure for the state commissions to redefine rural ILEC service areas and the FCC to concur. This process, as well as the underlying necessity of redefinition, was reaffirmed in the FCC's *ETC Report and Order* released March 17, 2005.

Decisions regarding the approval of redefining of service area usually take place as part of the state commission's designation process that also determines whether and the ETC applicant satisfies all of the other requirements for ETC designation including being in the "public interest". As part of this process, the state commission can approve the redefinition of the competitive ETC service area less than affected ILEC's study areas (only for ETC purposes) such that some grouping of one or more of their wire centers constitutes the competitive ETCs service area within that ILEC study area. FCC 04-37, *Highland Cellular ETC Designation Order*, 19 FCC Rec, Memorandum Opinion and Order, adopted February 24, 2004, released April 12, 2004 ("*Highland Cellular*"), p. 18, ¶ 37. In determining whether to grant such approval, the FCC considered the

factors set forth in by Federal-State Joint Board on Universal Service under 47 C.F.R. Section 54.207(d).<sup>17</sup> *Id.*, p. 5, ¶ 9. 17.11.10.24(A)1 NMAC references 47 CFR Section 54.207 relating to the Federal requirements regarding service areas.

In its decision in *Highland Cellular*, the FCC approved the redefinition of a service area of an ETC applicant which involved only a small portion -- two wire centers out of the 27 wire centers -- in the affected ILEC's study area. Those two wire centers were the only wire centers in the affected ILEC's study area in which the ETC applicant held an FCC license to serve. The FCC stated that denying the applicant ETC status for those two wire centers "simply because ... [the ETC applicant] is not licensed to serve the twenty five remaining wire centers [of that ILEC's study area] would be inappropriate." *Highland Cellular*, p. 18.

In NMPRC Utility Case No. 3026 (*Smith Bagley*)<sup>18</sup> this Commission concluded that:

"The PRC is empowered to designate ... [the applicant's] ETC service area boundary consistent with the public interest and that there is no rule requiring such boundary to match exactly that of the incumbent ILEC."

Admittedly, in *Smith Bagley* the redefined ETC service areas that this Commission approved included most of (but not all) of the respective ILEC's study area. (Recommended Decision page 17) However, *Highland Cellular* demonstrates that an ETC applicant's service area may be approved by a state commission or the FCC even

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<sup>17</sup> See Federal-State Joint Board on Universal Service, CC Docket 96-45 Recommended Decision, 12 FCC Rcd 87, 179-80, paras 172-74 (1996) ("1996 Recommended Decision").

<sup>18</sup> Recommended Decision and Certification of Stipulation August 14, 2001, pp. 17 (adopted by the PRC's Final Order, issued February 19, 2002)

where (as in the instant case) the proposed ETC area is only a very small portion of the affected ILEC's study area.

In *Smith Bagley*, and in *Plateau Telecommunications, Inc. ("Plateau")* (NMPRC Case No. 03-00345-UT) the approved redefined ETC service areas included some wire centers of at least one of the ILEC's which (as in the instant case) included areas that were beyond the ETC applicant's FCC's licensed areas. *Smith-Bagley*, Case No. 3026, Recommended Decision at 11; *Plateau*, Case No. 03-345-UT, Recommended Decision at 19.

In *Highland Cellular*, the FCC also has granted competitive ETC status for a service area which included an ILEC wire center, a portion of which was outside the ETC applicant's FCC wireless licensed area (i.e., that wire center straddled the ETC applicant's FCC boundary, which (as noted above) is the case for three wire centers in Leaco's current case: Del's Queen's wire center, ENMR's Corona wire center and Tularosa's Carrizozo wire center. See Phipps Rebuttal Test. pp. 4-5; Leaco's Second Revised Exhibit "B."

Leaco has asserted that CETC designation for the entirety of the proposed ETC area would enable Leaco to provide the benefits of ETC designation to all potential customers in that area, including those in each of the three wire centers (identified above) portions of which are inside and portions of which are outside Leaco's FCC wireless geographic licensed boundary.

Leaco has claimed specifically to Leaco's FCC wireless geographic licensed areas, redefinition will provide a wider local calling area, provide complete mobility, offer attractive basic universal service (BUS) rates, and enable Leaco to make the network

investments necessary to provide the service offerings and service quality of CDMA technology. Phipps Direct Test., p. 6; Phipps Rebuttal Test., pp. 6-7.

Leaco also asserted that approval of Leaco's proposed ETC areas (in conjunction with redefinition) beyond Leaco's FCC-licensed areas will provide customers in those areas with a substantially wider local calling area, 24 hour emergency support, local customer service representatives and local advertising about the nature and availability of the above benefits. Phipps Rebuttal, p. 7; Tr. (Phipps) pp. 32-33. Leaco also claims that it will advertise and make available the benefits of its own LITAP program in the portions of its proposed ETC area which straddle its FCC-licensed areas. Tr. (Phipps) pp. 26-27; 82-86.

By contrast, Leaco claimed that any denial of ETC designation would prevent Leaco from providing the benefits resulting from ETC designation to a substantial number of potential customers. Moreover, Leaco argued that there is no option of approving ETC designation for only those portions of a wire center that are within an ETC applicant's FCC wireless geographic licensed area because the FCC does not appear to encourage redefinition of only portions of a wire center.

In its *Highland Cellular* decision, the FCC found that redefinition merely enables competitive ETCs to serve areas that are smaller than the entire ILEC study area.<sup>19</sup> The FCC reiterated this finding in its *ETC Report and Order* (2005).<sup>20</sup>

Alternatively, Leaco asserted that requiring it to seek ETC designation for the entirety of the affected ILEC's study area would raise the same problems that Staff identified in opposition the proposal of such extensive scope contained in the (initial)

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<sup>19</sup> *Highland Cellular*, p. 19, ¶ 41.

<sup>20</sup> See ETC Report and Order, *supra*, 20 FCC Rcd at 6405.

Petition that Leaco filed on August 24, 2007. Smith Direct Test., pp. 8-9; 19, 25-28, 31. Staff claimed those problems would have included the excessive scope of Leaco's reliance on service by resale of other carriers' service due to the prohibition in Leaco's FCC wireless geographic license against direct service outside of its FCC-licensed areas. *Id.*

As noted above, a petition to redefine an ILEC's service area must contain "an analysis that takes into account the recommendations of any Federal-State Joint Board on Universal Service convened to provide recommendations with respect to the definition of a service area served by a rural telephone company."<sup>21</sup> In the *Recommended Decision* that laid the foundation for the FCC's *First Report and Order*, the Joint Board enumerated three factors to be considered when reviewing a request to redefine a LEC's service area.<sup>22</sup> These recommendations were adopted by the FCC in its *First Report and Order* (1997).

First, the Joint Board expressed concern as to whether the competitive carrier is attempting to "cream skim" by only proposing to serve the lowest cost exchanges.<sup>23</sup> Second Revised Exhibit C to Phipps Rebuttal provides a cream skimming analysis with respect to all of the wire centers that are either within or outside of Leaco's proposed amended ETC area. Leaco claimed that the revised Exhibit totally eliminates any basis for contending that the scope of our proposed ETC area is an attempt to avoid such cream skimming analysis. Phipps Rebuttal, pp. 11-12. Specifically, Leaco asserted that it demonstrated that the ILEC areas that we propose to include in our ETC designation have relatively low population densities (rather than high population densities which

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<sup>21</sup> 47 C.F.R. § 215(e).

<sup>22</sup> 1996 Recommended Decision, at 179-80, paras 172-74.

<sup>23</sup> *Id.*, at 180.

would indicate potential cream skimming). *Id.* Ms. Phipps testified that the Exhibit demonstrates that granting the requested redefinition would not result in any "cream skimming" by Leaco. *Id.*

Staff's analysis as set forth in Mr. Smith's Supplemental Testimony (Public Version), considered as its basis, what it referred to as "the quick summary of the FCC's permissive guidelines" for creamskimming analysis for CETC's proposing to compete with rural ILECs (original FCC footnotes deleted):

49. When a competitive carrier requests ETC designation for an entire rural service area, it does not create creamskimming concerns because the affected ETC is required to serve all wire centers in the designated service area. The potential for cream skimming, however, arises when an ETC seeks designation in a disproportionate share of the higher-density wire centers in an incumbent LEC's service area. By serving a disproportionate share of the high-density portion of the service area, and ETC may receive more support than is reflective of the rural incumbent LEC's costs of serving that wire center because support for each line is based on the rural telephone company's average costs for serving the entire service area unless the incumbent LEC has disaggregated its support. Because line density is a significant cost driver, it is reasonable to assume that the highest-density wire centers are the least costly to serve, on a per-subscriber basis ...."

51. The Commission has also determined that creamskimming concerns may be lessened when a rural incumbent LEC has disaggregated support to the higher-cost portions of the incumbent's service area. Specifically, under the Commission's rules, rural incumbent LECs are permitted to depart from service area averaging and instead disaggregate and target per-line high-cost support into geographic areas below the service area level. By doing so, per-line support varies to reflect the cost of service in a particular geographic area, such as a wire center, within the service area."<sup>24</sup>

Mr. Smith also testified that his Supplemental Exhibit A and Leaco's Second Revised Exhibit C are the primary documents that were referenced, as well as a table from the USAC website which shows disaggregation paths for the New Mexico ILECs listed. He further testified that Windstream (aka Valor) has a disaggregation plan in both of its

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<sup>24</sup> FCC 05-46 Report and Order, CC Docket 96-45, released March 17, 2005, Para 49-51, pp. 23-24; Smith Supplemental, pp. 20-21.

study areas.<sup>25</sup>

It should also be noted that Leaco has specifically set forth that the Mayhill was not included in its request. Phipps Rebuttal Test., p. 4, Leaco's Second Revised Exhibit "B."

In the instant case, Leaco has demonstrated that it is not picking and choosing the lowest-cost exchanges. Staff came to the same conclusion in its analysis of the Leaco cream-skimming data. Smith Supplemental Testimony, pp. 20-28.

Second, the Joint Board recommended that the FCC and the States consider that the 1996 Act places rural carriers on a different competitive footing than other LECs.<sup>26</sup> Determination of public interest is one of the considerations the Joint Board recommended. Leaco has presented evidence as to why it is in the public interest to approve its request. This issue is discussed in the Public Interest Analysis next section.

The *Highland Cellular Order*, on page 19, discusses the disaggregation issue:

Third, we find that redefining United Telephone's service area as proposed will not require United Telephone to determine its costs on any basis other than the study area level. Rather, the redefinition merely enables competitive ETCs to serve areas that are smaller than the entire ILEC study area. Our decision to redefine the service area does not modify the existing rules applicable to rural telephone companies for calculating costs on a study area basis, nor, as a practical matter, the manner in which United Telephone will comply with these rules. Therefore, we find that the concern of the Joint Board that redefining rural service areas might impose additional administrative burdens on affected rural telephone companies is not at issue here.

Leaco argued that it is highly unlikely that any action in this proceeding will affect or prejudice any future action that this Commission or the FCC may take with respect to

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<sup>25</sup>

*Id.*

<sup>26</sup>

Joint Board Decision, *supra*.

any ILEC's status as a rural telephone company, and nothing about service area redefinition will diminish an ILEC's status as such.

It should also be noted that the Intervenor's Post-hearing Brief requested that the Recommended Decision include an affirmative determination that the redefinitions proposed by Leaco do not require the intervenors to disaggregate their wire centers or otherwise alter the current mechanism for calculating their cost of service on a study area basis.

Third, the Joint Board recommended that the FCC and the States consider the administrative burden a rural ILEC would face.<sup>27</sup> In discussing this factor in *Highland Cellular*, p. 19, ¶ 41, the FCC found that the redefinition of the ILEC service area would not require the ILEC to determine its costs on any basis other than the study area level. The FCC did not find that redefinition would impose an administrative burden on the ILEC. *Id.* Similarly, in the instant case, Leaco argued that Leaco's request to redefine its CETC service area to less than the affected rural ILECs' entire study areas along wire center boundaries is made solely for ETC designation purposes. Tr. (Phipps), p. 54.

As in *Highland Cellular*, Leaco asserted that redefining the service area for ETC purposes will not administratively burden the way that affected rural ILECs calculate their costs, but is solely to enable Leaco to begin receiving high-cost support in those areas in the same manner as the ILECs. Rural ILECs may continue to calculate costs and submit data for purposes of collecting high-cost support in the same manner as they do now. Leaco asserted that it is not asking any ILEC to disaggregate its study area. Tr. (Phipps), p. 55. Therefore, in Leaco's case (as in *Highland Cellular*)

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<sup>27</sup> *Id.*

redefinition will not impose any administrative burden on the ILEC, within the meaning of the Joint Board's Third consideration.

For all of the above reasons, as well as the evidence presented in the Public Interest Analysis Section, designation of Leaco as an ETC in the areas it proposes will be in the public interest. Leaco has demonstrated that its proposed redefinition of the designated rural ILEC service areas satisfies all three of the Joint Board's recommendations and the FCC's analysis.

#### **F. Public Interest Analysis**

In cases involving requests for ETC designation in rural ILEC service areas, section 214(e)(2) prescribes that a state commission must also find that the requested designation will be in the public interest. A public interest determination is necessary in this proceeding because Leaco is seeking ETC designation in rural ILEC service areas. The Commission traditionally has applied the eligibility criteria of the Federal Act and various other factors in evaluating ETC petitions. The factors considered in assessing whether an ETC designation is in the public interest have been determined by the Commission on a case-by-case basis.<sup>28</sup> As the Commission has said, a "flexible, case-by-case approach to ETC designation – particularly where the public interest is concerned – is the best approach."<sup>29</sup>

In analyzing whether designation of a given carrier as an ETC would be in the public interest, the Commission has had occasion to consider the approach taken by the FCC. The FCC addressed the public interest criteria applicable to requests for federal ETC designation in rural areas by common carriers not subject to state commission

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<sup>28</sup> Case No. 04-00396-UT, Recommended Decision of the Hearing Examiner (Feb. 6, 2006), at 10 (approved by Final Order of the Commission entered March 14, 2006).

<sup>29</sup> Final Order, Case No. 03-00345-UT, at 2.

jurisdiction pursuant to 47 U.S.C. § 214(e)(6) in the case of *Virginia Cellular*.<sup>30</sup> There, finding a “need for a more stringent public interest analysis for ETC designations in rural telephone company service areas,” the FCC concluded that, pending further action on its part, in determining whether designation of a competitive ETC in a rural telephone company’s service area is in the public interest, the FCC will weigh “numerous factors,” including: (1) the benefits of increased competitive choice; (2) the impact of multiple designations on the [federal] universal service fund; (3) the unique advantages and disadvantages of the competitor’s service offering; (4) any commitments made regarding quality of telephone service provided by competing providers; and (5) the competitive ETC’s ability to provide the supported services throughout the designated service area within a reasonable time frame.<sup>31</sup>

In the Recommended Decision in Case No. 03-00345-UT, the Hearing Examiner applied the *Virginia Cellular* public interest criteria to Plateau’s request for ETC designation in RSAs 2 and 4.<sup>32</sup> However, in applying those criteria, the Hearing Examiner emphasized that *Virginia Cellular* is not binding on the Commission in exercising the grant of jurisdiction conferred on it by 47 U.S.C. § 214(e)(2).<sup>33</sup> Nevertheless, the Hearing Examiner concluded that, in conformity with the flexible approach the Commission has taken with respect determining whether an ETC designation is in the public interest,<sup>34</sup> it was appropriate for the Commission to refer to

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<sup>30</sup> *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563 (rel. Jan. 22, 2004) (“*Virginia Cellular*”).

<sup>31</sup> *Id.* 19 FCC Rcd at 1565, ¶ 4.

<sup>32</sup> Recommended Decision, Case No. 03-00345-UT (June 25, 2004), at 17, fn. 3, and at 26-32.

<sup>33</sup> *Id.* at 24.

<sup>34</sup> Final Order, Case No. 03-00345-UT, at 2-3. See Recommended Decision, Case No. 04-00396-UT, at 10-11.

decisions of the FCC and other state commissions for potential guidance in reviewing ETC petitions.<sup>35</sup>

Subsequently, in amending the State Rural Universal Service Fund ("SRUSF") rule, the Commission adopted criteria applicable to evaluating ETC petitions that track the *Virginia Cellular* factors. Thus, the SRUSF rule now provides that, among other things, a petitioner seeking ETC designation and support from the state universal service fund must:

- demonstrate that the proposed designation is in the public interest;
- demonstrate that the petitioner will satisfy consumer protection and quality of service standards;
- demonstrate that granting ETC status to the petitioner in the designated area is likely to result in more customer choice;
- address the impact of designation of the petitioner on the size of the fund;
- address the unique advantages and disadvantages of the petitioner's service offering; and
- demonstrate the petitioner's willingness and ability to offer service throughout the designated service area within a reasonable time frame.<sup>36</sup>

In addition to these factors, pertinent to this discussion are the rule's requirements that a petitioner acknowledge it may be obligated to provide equal access if all other ETCs in the designated area relinquish their designations<sup>37</sup> and demonstrate the ability to remain functional in emergency situations.<sup>38</sup>

1978 NMSA, Section 63-9H-2 of the Rural Telecommunications Act, sets forth that part of its purpose is to "encourage competition and reduce regulation in the

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<sup>35</sup> Recommended Decision, Case No. 03-00345-UT, at 25.

<sup>36</sup> 17.11.10.24.A(3), A(7), A(10), A(11), A(12) and A(13) NMAC.

<sup>37</sup> 17.11.10.24.A(6) NMAC.

<sup>38</sup> 17.11.10.24.A(9) NMAC.

telecommunications industry, thereby allowing access by the public to resulting rapid advances in telecommunications technology.”<sup>39</sup> As previewed above, in revising the SRUSF rule the Commission adopted additional criteria to be considered in reviewing petitions for ETC designation.<sup>40</sup>

Leaco and Staff have asserted that designating Leaco as an ETC in the requested areas is in the public interest. Tr. (Phipps), p. 108, Tr. (Smith) pp. 179-180 (with respect to the requirement in 17.11.24A(3)); Smith Supplemental Test., pp. 35-36; Staff Affidavit filed May 12, 2008. Leaco and Staff claim that Leaco satisfies the public interest criteria as outlined by the FCC in *Virginia Cellular*, and the demonstration that the proposed designation is in the public interest as required by 17.11.10.24A(3) NMAC.

With respect to the first public interest factor which *Virginia Cellular* asks be weighed, the benefits of competitive choice, Leaco asserted that consumers in rural areas will benefit by the competition brought about by designating Leaco as an additional ETC in areas which it proposes. Tr. (Phipps) p. 100; Phipps Rebuttal, p. 7; Tr. (Phipps) pp. 32-33; Smith Supplemental Test., p. 6. Ms. Phipps testified that the proposed expansion of Leaco’s ETC service area within its FCC-licensed area will advance the public interest for existing customers of all ILECs, including the Leaco Rural Telephone ILEC customers, by: 1) bringing a larger local calling area, 2) providing current CDMA cellular technology which includes; data capability, clearer voice calls, text messaging, and E9-1-1 capable handsets, 3) by providing complete mobility, including access to emergency services while mobile 4)

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<sup>39</sup> NMSA 1978, § 63-9H-2.

<sup>40</sup> 17.11.10.24.A(3), A(7), A(10), A(11), A(12) and A(13) NMAC.

and by offering a local basic universal service (BUS) plan at a net of \$4.49 that is less expensive than the Leaco ILEC BUS, which would be \$11.78 after discounts. Phipps Rebuttal, pp. 6-7.

Further, Leaco asserted that the amendment of Leaco's ETC service area as proposed will advance the public interest for customers of the ILECs in those respective geographic areas by offering Leaco's attractive rates and wider local calling area; providing the monthly billing to the customer along with a monthly newsletter and industry updates; providing local customer service representatives (the customer will speak directly with a local person), allowing Leaco to provide an exceptional customer interface; and 24-hour emergency support. *Id.*, p. 7 Leaco also claimed that it also will enable customers in those areas to be reached by additional advertising about the availability of each of the above benefits. *Id.*

The Second public interest factor requires that an ETC Applicant "address the impact on the size of the fund." Granting Leaco its proposed ETC designation would have not have a significant impact on the fund. Tr. (Phipps) pp. 33-34. Leaco would receive approximately 0.68 percent of the federal high-cost fund even if it were to capture each and every line within its proposed expanded ETC service area.<sup>41</sup> Leaco Updated Petition, p. 22. The State Commission does not have control over disbursing the federal High Cost Fund; it has control over only the initial designation and annual certification of eligibility. Leaco argued that the cumulative effect of additional ETC designations in areas served by rural carriers would be better addressed at the national level. However, according to Leaco, it

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<sup>41</sup> See FCC Filings, Second Quarter Appendices – 2007, High Cost Appendix HC01, available on the USAC web site at [www.universalservice.org](http://www.universalservice.org).

should be noted that the FCC itself has been unable to draw a definitive conclusion regarding the impact of a single ETC designation on the High Cost Fund. In *Virginia Cellular*, the FCC noted "in light of the rapid growth of competitive ETCs, comparing the impact of one competitive ETC on the overall fund may be inconclusive." 19 FCC Rcd at 1576, ¶ 31 note 96.

In the present proceeding, Leaco provided confidential Exhibit "G," which estimated the USF recovery for Leaco in its proposed ETC service areas. Pursuant to a review of this evidence, the projected Leaco support as a total of the high cost fund will have a minimal impact on the fund, which is only comparable with the criteria of *Virginia Cellular*, but it is also consistent with the amount of HCF recovery for Leaco.

The third public interest factor evaluated in *Virginia Cellular* analyzes the unique advantages and disadvantages of the competitor's service offering. 19 FCC Rcd. at 1575, ¶ 28. In the current case, Leaco asserted that it offers multiple unique advantages over its competitors. Leaco's local coverage area is larger than its competitors, thus reducing the roaming costs that are passed along to the consumer. Leaco offers substantially more local minutes than the competition; 24 hour emergency support, local customer service representatives, local billing, local information. Tr. (Phipps) p. 100.

As for the fourth *Virginia Cellular* public interest factor, as evidence of its commitment to high quality service, Virginia Cellular committed to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service ("CTIA Code"). *Virginia Cellular*, 19 FCC Rcd at 1576, ¶ 30. The CTIA

Code provides certain principles for wireless carriers to follow. In the current case, Leaco continues to comply with the CTIA Code {as part of its annual ETC reporting requirements. Tr. (Phipps) p. 108. Leaco further agreed to comply with the annual reporting requirements to the Commission under 17.11.27 NMAC and 17.11.10.24 NMAC. *Id.*, pp. 109-110. Leaco also agreed to comply with other requirements for ETC designation, including those concerning construction plans and advertising. *Id.*, pp. 108-109.

The fifth factor evaluated in *Virginia Cellular* to determine if designation as an ETC was in the public interest was Virginia Cellular's ability to provide the supported services throughout the designated service area within a reasonable time frame. 19 FCC Rcd at 1576, ¶ 28. In considering all of the evidence, Leaco satisfies this requirement.

Commission Rule 17.11.10 NMAC, State Rural Universal Service Fund sets forth several criteria for ETC designation within 17.11.10.24A NMAC that are to be considered. The record demonstrates that Leaco has presented substantial evidence showing that its CETC Petition as updated satisfies the Commission's public interest criteria. Leaco has shown that its CETC Petition as updated meets the criteria under 17.11.10.24 NMAC. At the hearing, Staff acknowledged that Leaco had met all of the criteria with the exception of the criteria relating to low income consumer and the criteria relating to its five year plan. Tr. (Smith) pp. 179-180.

During the hearing on the merits of this case, Staff suggested that Leaco provide Staff with additional information concerning both Leaco's efforts to reach low income consumers and its proposed five-year construction plan. In response thereto, Leaco

asserted that it had informally submitted such additional information for Staff's review. Leaco claimed that it had updated and submitted for Staff's review the information on several previously-filed (confidential and non-confidential) exhibits relating to its five-year construction plan to reflect its most recent planning concerning the timing and location of some of its proposed construction. Leaco filed a motion that requested the introduction into the record of six (6) documents to clarify and/or supplement the record for the purpose of demonstrating that Leaco's proposed ETC designation satisfies the applicable requirements of federal and New Mexico law relating to ETC applications, is in the public interest and should be approved.

In Staff's Response, Staff asserted that the six documents identified in Leaco's Motion to Supplement are relevant and material to Leaco's Application in this case. Staff also asserted that it did not object to Leaco's Motion to Supplement and that Staff did not require further examination of the documents.

An Order was issued that: allowed Leaco to file its Supplemental Documents; required within seven days of Leaco's Supplemental filing, Staff to file an affidavit regarding the Supplemental filing; and, afforded any party an opportunity to request a hearing regarding the Supplemental filing, Staff's Affidavit, and/or other issues related to these items. Leaco filed the Supplemental Documents, and Staff filed its Affidavit. The following Leaco Supplemental Documents were filed:

A. a (non-confidential) statement (identified as Exhibit "L") of Leaco's efforts to reach low income consumers;

B. a (non-confidential) internal Leaco manual (identified as Exhibit "M") concerning its LITAP and Link-up efforts;

C. a (confidential) update to Leaco's (confidential) Exhibit "H," concerning its five-year construction plan;

D. a (confidential) update to Leaco's (confidential) Exhibit "I," a map indicating the approximate geographic locations of the anticipated build-out of facilities under its five-year construction plan;

E. a (confidential) update to Leaco's (confidential) Exhibit "J," a table which describes Leaco's proposed build-out on a wire center-by-wire center basis pursuant to its five-year construction plan; and

F. a (confidential) new exhibit (identified as Exhibit "N") consisting of a spreadsheet showing the approximate amounts of Leaco's proposed construction expenditures by various categories of investment.

These documents provided additional information requested by Staff.<sup>42</sup> There was a minor discrepancy between Exhibit "H" and Exhibit "J" of the documents filed by Leaco. Leaco stated it would correct the discrepancy between those exhibits with an errata notice in this case. The discrepancy had an immaterial effect on Staff's conclusions in the case.<sup>43</sup>

After review of the information, Staff concluded that Leaco's proposed designation satisfied all the applicable requirements of Federal and State law and regulation relating to the designation of competitive eligible communications carriers. Staff Affidavit. Further, Staff asserted that under the rules and guidelines in place at the time of the hearing, Leaco demonstrated that approval of its designation petition satisfies the "public interest" criteria. *Id.* Staff's Affidavit recommended approval of Leaco's Petition for expansion of its designation as a competitive eligible communications carrier in New Mexico.

No request for hearing nor objection was made regarding these filings. Leaco's

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<sup>42</sup> Staff Affidavit.

<sup>43</sup> *Id.*

Supplemental Documents as identified above, and Staff's sworn Affidavit, are hereby made part of the record for consideration in this case.

### **CONCLUSIONS**

The written and oral testimonies of Leaco and Staff, and the supplemental data and exhibits, support Leaco's designation for federal CETC status in each of the wire centers listed in its updated Petition, its Rebuttal Testimony, Leaco (Revised) Exhibit "A" and Leaco (Second Revised) Exhibit "B."

Leaco can provide and is providing all of the services required for CETC designation. The Hearing Examiner finds that there is substantial evidence of Leaco's commitment to quality and service, and that it is in the public interest that Leaco be designated as an CETC in each of these wire centers identified above.

Leaco has presented substantial evidence of Leaco's compliance with all applicable federal and state requirements for designation as a federal CETC in each of the wire centers identified above, and that Leaco should be designated as a federal CETC in each of those wire centers.

As in prior ETC cases, the Commission's finding of eligibility should be expressly conditioned upon the Commission's continuing jurisdiction over the parties and the subject matter of this case.

The Hearing Examiner recommends that the Commission **FIND** and **CONCLUDE** that:

1. The Statement of the Case, Discussion, and all findings and conclusions contained therein should be incorporated by reference as findings and conclusions of the Commission.

2. Due and proper notice of this matter has been given.
3. The Commission has jurisdiction over the parties and the subject matter of this case.
4. Leaco CLEC is a certified provider of public telecommunication services in New Mexico and, as such, is regulated by the Commission.
5. Leaco has satisfied the eligibility criteria for designation as a Federal CETC eligible for High Cost Fund support in the rural service areas and wire centers as set forth in Attachment 1 and 2 hereto, subject to all reporting requirements specified in the Commission's Rules.
6. Leaco's designation as a federal CETC in the requested service areas and wire centers is in the public interest pursuant to 47 U.S.C. § 214(e)(2) and 17.11.10.24 NMAC.
7. Leaco has demonstrated its willingness and ability to meet all other requirements and standards set forth under applicable New Mexico law pertaining to eligibility for federal CETC status, and the Commission has the authority to require Leaco to continue to meet such standards established for CETCs in New Mexico.
8. 17.11.10.24(A)4 and 17.11.10.24(B) NMAC, relating to ETC requests for state ETC support rates, are not applicable to Leaco's designation request in this case.

The Hearing Examiner recommends that the Commission **ORDER**:

- A. There is substantial evidence adduced in this proceeding

demonstrates that Leaco meets the requirements for CETC designation pursuant to 47 U.S.C. §214(e)(2) and 17.11.10.24. NMAC, and the recommendations of the Federal-State Joint Board on Universal Service.

B. Leaco is willing and able to meet all other requirements and standards set forth under applicable New Mexico law, including the applicable requirements of 17.11.10.24 NMAC, pertaining to eligibility for CETC status, and the Commission has the authority to require Leaco to continue to meet such standards established for ETCs in New Mexico.

C. In light of all of the above matters, contingent on concurrence by the FCC, Leaco should be designated as a federal competitive ETC in each of the requested service areas and wire centers identified in Appendices "1" and "2" hereto. These include wire centers of Dell, E.N.M.R., Leaco ILEC, Penasco, Tularosa, and Windstream # 2. Nothing in this Order shall be construed in any manner to affect the study areas of each of the above ILECs for any other purpose.

D. The designation hereby conferred shall be and is conditioned on the Commission's continuing jurisdiction over the parties and subject matter of this case. In particular, this Order is and shall be conditioned upon the Commission's continuing jurisdiction including but not limited to the Commission's continuing jurisdiction to regulate wireless CETC telecommunications carriers and the services they provide to New Mexico consumers.

E. Within sixty days of this Order, Leaco shall file an affidavit

with the Commission verifying that it is making Lifeline service available to customers in accordance with 47 C.F.R. § 54.405.

F. Leaco shall include its new ETC area in its annual ETC report to the Commission verifying that it continues to satisfy the criteria for the ETC designation as part of its annual request for CETC certification, and shall include all information as agreed upon in the record herein.

G. Leaco shall provide Staff with mutually acceptable affidavits, reports, and other information that the Commission may require to demonstrate compliance by Leaco with this Order and with all requirements of federal and state law applicable to federal CETC designation.

H. This Order is effective immediately.

I. Copies of this Order shall be sent to all persons on the attached certificate of service.

J. This docket is closed.

**ISSUED** at Santa Fe, New Mexico this 8<sup>th</sup> day of October, 2008.

**NEW MEXICO PUBLIC REGULATION COMMISSION**



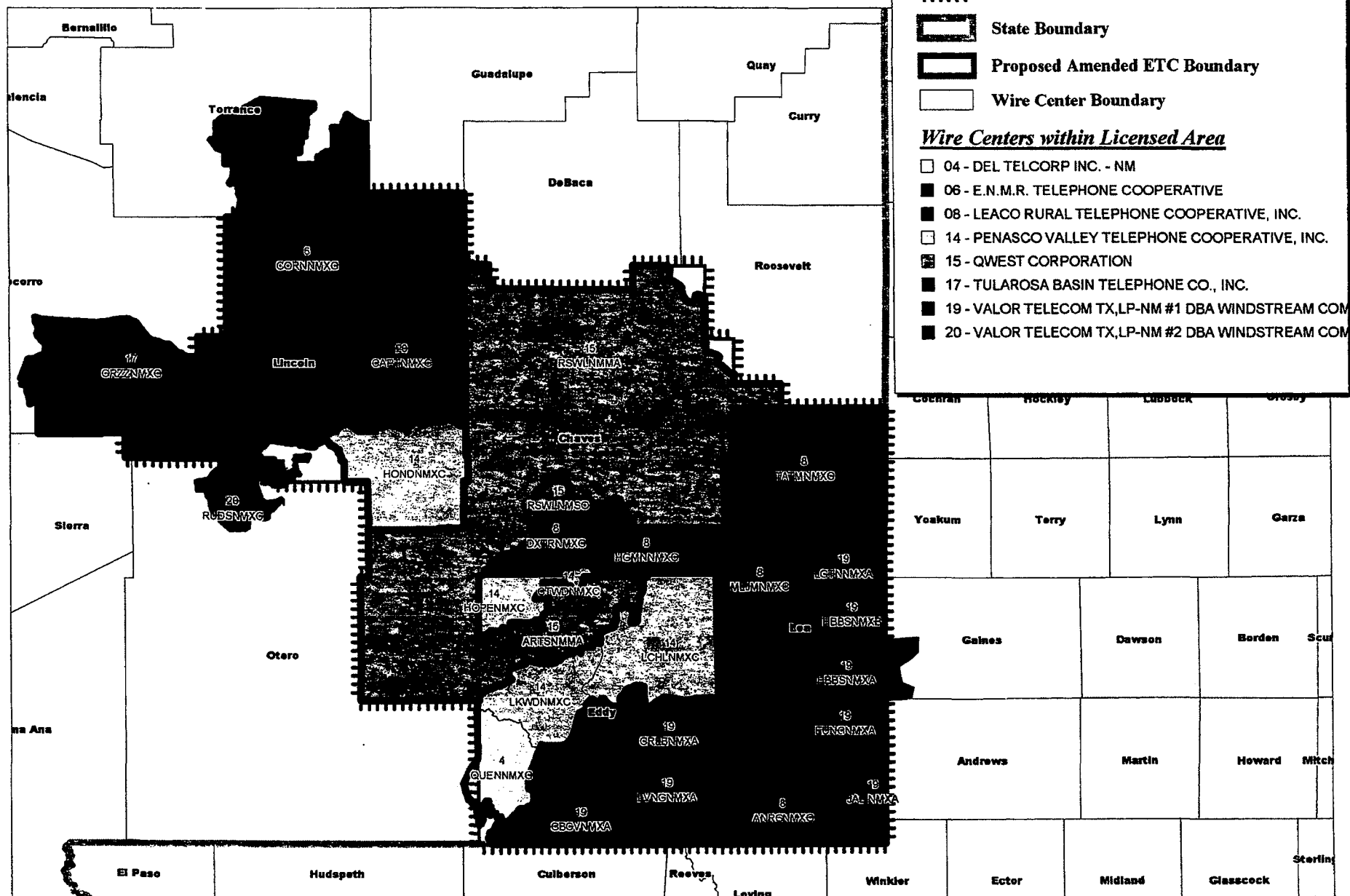
Elizabeth C. Hurst  
Hearing Examiner

# Appendix "1" to proposed Joint Recommended Decision

<u>Company</u>	<u>Locality</u>	<u>Wire Center</u>
DEL TELCORP INC. - NM	*QUEENS	QUENNMXC
E.N.M.R. TELEPHONE COOPERATIVE	*CORONA	CORNNMXC
LEACO RURAL TELEPHONE	ANTELOPE RIDGE	ARGNMXC
	DEXTER	DXTRNMXC
	HAGERMAN	HGMNNMXC
	MALJAMAR	MLJNMXC
	TATUM	TATNMXC
PENASCO VALLEY TELEPHONE COOPERATIVE, INC.	COTTONWOOD	CTWDNMXC
	*HONDO	HONDNMXC
	HOPE	HOPENMXC
	LOCO HILLS	LCHLNMXC
	LAKEWOOD	LKWDNMXC
TULAROSA BASIN TELEPHONE CO., INC.	*CARRIZOZO	CRZZNMXC
VALOR TELECOMMUNICATIONS OF NEW MEXICO, LLC #2	*CAPITAN	CAPTNMXC

\* The wire centers marked above by an asterisk, straddle Leaco's FCC Licensed service area; Leaco will serve only by resale in the portions of these wire centers which are outside its FCC licensed area.

**EXHIBIT A**  
**Existing and Proposed Amended ETC Service Areas**



**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE APPLICATION )  
OF LEACO RURAL TELEPHONE )  
COOPERATIVE, INC. AS A COMPETITIVE )  
LOCAL EXCHANGE CARRIER FOR )  
DESIGNATION AS AN ELIGIBLE )  
TELECOMMUNICATIONS CARRIER FOR )  
ADDITIONAL SERVICE AREAS )  
\_\_\_\_\_ )

**Case No. 07-00235-UT**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **Final Order** issued November 13, 2008, was mailed on November 14, 2008, by first class, postage pre-paid to each of the following:

Steven Asher, Esq.  
301 E. Berger Street  
Santa Fe, NM 87505-2613

Thomas W. Olson, Esq.  
Montgomery & Andrews PA  
PO Box 2307  
Santa Fe, NM 87504-2307

Laura M. Phipps  
LEACO Rural Telephone Coop.  
1500 N. Love Street  
Lovington, NM 88260

Bill R. Garcia, Esq.  
Windstream Telecom  
1800 Old Pecos Trail, Suite J  
Santa Fe, NM 87505

Cohen & Cohen  
Attorneys at Law  
PO Box 789  
Santa Fe, NM 87504-0789

The Honorable Gary King  
New Mexico Attorney General  
PO Drawer 1508  
Santa Fe, NM 87504-1508

William Templeman, Esq.  
Comeau, Maldegen, Templeman & Indall  
141 E. Palace Ave.  
Santa Fe, NM 87501

**Hand delivered to:**  
Avelino Gutierrez, Esq.  
NM Public Regulation Commission  
224 E. Palace Ave. – Marian Hall  
Santa Fe, NM 87501

**DATED this 14<sup>th</sup> day of November, 2008.**

**NEW MEXICO PUBLIC REGULATION COMMISSION**

  
\_\_\_\_\_  
Ana C. Kippenbrock, Paralegal

**Leaco Rural Telephone Cooperative, Inc.**

**EXHIBIT B**

DOCKET FILE COPY ORIGINAL  
NEW MEXICO PUBLIC REGULATION COMMISSION



1120 Paseo de Peralta/P.O. Box 1269  
Santa Fe, NM 87504-1269  
1-888 4 ASK PRC

**COMMISSIONERS**

DISTRICT 1 JASON A. MARKS, CHAIRMAN  
DISTRICT 2 DAVID W. KING  
DISTRICT 3 BEN R. LUJAN  
DISTRICT 4 CAROL K. SLOAN  
DISTRICT 5 SANDY JONES, VICE CHAIRMAN

Received & Inspected

*Office of Chairman Jason A. Marks*  
(505) 827-8015 Fax (505) 476-0474

November 20, 2008

NOV 25 2008

FCC Mail Room

Via Federal Express<sup>1</sup>

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington DC 20554  
(Attention: Wireline Competition Bureau, TAPD)

Ms. Karen Majcher  
Vice President, High Cost and Low Income Division  
Universal Service Administrative Company  
2000 L Street, NW, Suite 200  
Washington, DC 20036

**Re: State Commission Certification of Extension of Existing Designation of Leaco Rural Telephone Cooperative, Inc. as an Eligible Telecommunications Carrier for Universal Service Funds, CC Docket No. 96-45**

Dear Madam Secretary and Ms. Majcher:

In accordance with the Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and, Further Notice of Proposed Rulemaking in CC Docket 96-45, and *Report and Order* in CC Docket No. 256 adopted May 10, 2001, the New Mexico Public Regulation Commission ("NMPRC") certifies as follows:

- 1) That Leaco Rural Telephone Cooperative, Inc. ("Leaco") has received approval from the New Mexico Public Regulation Commission ("NMPRC") for the expansion of its competitive eligible telecommunications carrier (CETC) designation in certain New Mexico service areas as indicated in the enclosed Recommended Decision and Final Order (issued November 13, 2008) of the NMPRC in Case No. 07-00235-UT.
- 2) That federal Universal Service Funds, to the best of our knowledge, and subject to compliance with the NMPRC's applicable rules on ETC reporting, or, if applicable, as self-certified by the carrier, will be used "only for the provision, maintenance and

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upgrading of facilities and services for which such support is intended, as outlined in 47 USC § 254(e).

#### Leaco's Previous ETC Designations

Leaco is a multi-divisional telecommunications cooperative providing service in southeastern New Mexico as an incumbent local exchange carrier ("ILEC") and, through its unincorporated divisions, as a competitive local exchange carrier ("CLEC"), as a commercial mobile radio service ("CMRS") provider, and as an ISP (Internet Service Provider). Petition, 8/24/07. Leaco provides service in portions of Chaves, Eddy and Lea counties and as a CLEC, in portions of the service territories of Windstream and Qwest Corporation (Qwest).

On March 26, 2002, the NMPRC, through its Final Order in Case 3347, designated Leaco as an ETC for the provisioning of wireline services in the territories that Leaco serves as a CLEC. Leaco had previously received CLEC designation for all of the GTE of the SouthWest (now Windstream #1) exchanges of Carlsbad, Carlsbad Caverns, Loving, Lovington, Hobbs Main, Hobbs North, Eunice and Jal, and non-rural designation for US West's (now Qwest's) exchanges of Artesia, Roswell Main, Roswell South and Portales.

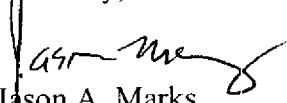
On March 14, 2006, the NMPRC, through its Final Order in Case 03-00396-UT, designated Leaco as a state and federal ETC, on a prospective basis only, for the wireless services that Leaco provides as a CLEC in the exchanges in the Valor (now Windstream) study area and in the Qwest service territory for which Leaco CLEC was previously granted ETC designation for wireline services (in Case 3347). The Commission designated Leaco as an ETC for the wireless ETC service area of the Lovington, Hobbs, East Hobbs, Eunice, Jal, Loving, Carlsbad, Carlsbad Caverns wire centers served by Windstream #1, and the Roswell, Cottonwood and Artesia wire centers served by Qwest.

#### Leaco's Newly Expanded ETC Designation

On November 13, 2008, the NMPRC, through its Final Order in Case 07-00235-UT, expanded Leaco's ETC designation for purpose of federal USF support. Specific details about the affected exchanges and wire centers of the additional service areas, including, as required, the rural incumbent carriers and the wire centers associated with each rural incumbent study area, are provided in Exhibit A to the attached Recommended Decision of the Hearing Examiner issued on October 8, 2008.<sup>2</sup>

If additional information is required, please contact Mr. Roy E. Stephenson, Director, Utilities Division (800-827-4500) at the offices of the NMPRC's Telecommunications Bureau, at Marian Hall, 224 East Palace Avenue, Santa Fe New Mexico 87501.

Sincerely,

  
Jason A. Marks  
Chairman

---

<sup>1</sup> Also sent via e-mail to:

**Universal Service Administrative Company**

444 Hoes Lane

RRC 4A1060

Piscataway, NJ 08854

Fax: **866-873-4666**

E-mail: [hcfilings@heli.universalservice.org](mailto:hcfilings@heli.universalservice.org)

<sup>2</sup> Please note that the accompanying materials also include the NMPRC Final Order adopting the Recommended Decision and granting Leaco's unopposed Motion For Errata Notice concerning the wire centers of Hondo and Capitan. Exhibit A to the Recommended Decision should therefore be read as corrected by the Final Order.